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No.

In The

Supreme Court of the United States

October Term, 1997

DUANE JELEAL OSBOURNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner was denied due process and a fair trial by virtue of the trial court's failure to issue a multiple conspiracies instruction?

2. Whether a playground open only to the occupants of a privately-owned apartment building and their guests is open to the public within the intendment of 21 U.S.C.A. § 860?

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Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 19, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is entitled *United States v. Duane Jeleal Osbourne*. The unpublished opinion is reprinted at Appendix A.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the United States Court of Appeals for the Fourth Circuit is based on 28 U.S.C.A. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks review of issues arising under the Fifth and Sixth Amendments to the United States Constitution (Appendix B); and 21 U.S.C.A. § 860(e)(1) (Appendix C).

STATEMENT OF THE CASE

I. Introduction

A. The Legal Issue

The instant Petition for Certiorari presents this Court with a question of great public importance and juridical significance. Specifically, the question at issue is in reference to the law relative to issuance of a multiple conspiracies instruction in a criminal trial. Petitioner was indicted with 11 identified others and charged with a single conspiracy to possess and distribute cocaine. At trial, the United States' proofs consisted almost exclusively of the testimony of six unindicted others who claimed to have transacted business with petitioner. Despite testimony from amongst those cooperating others that they all had "separate parallel operations", the indictment nonetheless charged a single conspiracy. More importantly,

the proofs at trial did not make reference to the 11 indicted others as others as having any connection to petitioner, only the unindicted others. That failure of proofs gave rise to the error herein.

The district court did not *sua sponte* issue a multiple conspiracies instruction as it was required to do. The instant matter exhibits the clear trend away from adherence to the teaching, of this Court as set forth in *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). Congress, when it enacted 21 U.S.C.A. §§ 841(a)(1) and 846, did not intend to authorize the United States to string together several separate and district conspiracies. The prevailing problem is that the toleration of this tact by district courts has gone too far. Absent intercession by this Court, the problem will expand and due process will continue to be routinely disregarded. It bears repeating that the district court below was required on its own to issue a multiple conspiracies instruction.

B. The Case At Issue

The instant appeal arises from petitioner's conviction of participation in a conspiracy to distribute cocaine. The evidence adduced as to petitioner was embodied almost exclusively within the testimony of several alleged co-conspirator/informants, all of whom received significant consideration in exchange for testimony. Petitioner was portrayed as one of the New York-based suppliers to the North Carolina-based distributors. However, contrary to the other alleged co-conspirators, petitioner had no prior history of any criminal activity and produced several substantial family members and others from his community to testify as to his good works and character. Moreover, none of the cooperators was able to provide evidence of any violent or anti-social behavior by petitioner. In contrast, almost all of the cooperators were previously involved in shootings, firebombing, robberies and similar conduct. Much of the violent conduct related to hostilities between indicted and unindicted alleged co-conspirators.[1]

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1. The primary issue raised herein is that Count One should have been dismissed for duplicity. It charged a single conspiracy and multiple conspiracies were proved at trial. The hostilities between alleged co-conspirators was proof that separate, distinct and antagonistic groups existed as opposed to a federation with a common purpose.

Petitioner testified at trial and maintained his innocence. The most probative aspect of the United States' proof is with respect to the backgrounds of its witnesses and the consideration offered to them. The largest drug trafficker amongst the group, viz. Darwin Mobley, had his sentence reduced to 5 years in return for his cooperation. Despite the fact that no physical evidence exists respecting petitioner's involvement in the trafficking network, he received the greatest sentence — 360 months. The defense theorized at trial that the truly guilty schemed to falsely implicate petitioner

II. The United States' Proofs

i. The Alleged Co-Conspirator/Informants

a. Darwin Jerome Mobley

Mobley entered a plea of guilty to "conspiracy to traffic cocaine". The disposition negotiated between Mobley and the United States incorporated the stipulation that Mobley testify in the instant matter. The agreement further provided that any sentence imposed on Mobley would not exceed 262 months. Prior to trial Mobley was sentenced to a 20 year (240 months) period of imprisonment. However, Mobley was granted bail and at liberty when he testified. So too, Mobley anticipated that his testimony at trial would underpin a Rule 35 motion and further reduction of the sentence. Indeed, Mobley's sentence was ultimately reduced to 5 years (60 months) imprisonment.

Mobley testified that he operated a "drug business" in the Grier Heights section of Charlotte. His participation in the drug trafficking business commenced in 1993. Mobley initially "worked for . . . [his] Uncle Paul". Mobley described his responsibilities as "just riding with [Uncle Paul] and bagging up drugs". Mobley claimed with respect to quantity that he was "bagging up kilos of crack cocaine". Mobley stated that several others were employed within the organization in which he functioned with his Uncle Paul. Mobley identified those others as "my brother [Jesse Mobley], my cousin Ronnie [Brown], my cousin Jack [and] my cousin Jamie".

Mobley remained in the employ of his uncle for "approximately about five months". During this period, Mobley was introduced to an

"individual named Peter". Mobley described his "Uncle Paul's organization" to Peter. Peter subsequently "offered to supply [Mobley's] Uncle Paul". Peter allegedly identified his own source of supply as an individual named "Rocky". Mobley thereafter became aware that the name Peter was an alias used by Balford Wiles. Wiles also used the alias Jhamarian Chambers. After he established a relationship with Wiles, Mobley decided to initiate his own operation independent of his "Uncle Paul" and in concert with Wiles.

Mobley testified that the first actual purchase from Wiles involved "25 ounces of crack cocaine". "Uncle Paul" paid Wiles $19,000 for that amount. According to Mobley, the transaction occurred "in April of 1993". Mobley testified that "Rocky brung it down with an individual named Bobby". Mobley identified petitioner in-court as being the individual referred to as Rocky. Mobley testified that he met petitioner "when [petitioner] came down [to Charlotte]". However, Mobley had no personal conversation with petitioner. Nevertheless, Wiles allegedly "told [Mobley] that [petitioner] could bring as much crack cocaine as [they] wanted". In this context, Mobley testified that petitioner returned to Charlotte three days after the first delivery.

The alleged second delivery of 10 ounces was for Mobley himself as opposed to "Uncle Paul". As was noted above, Mobley and Wiles previously decided to become partners. Mobley testified that petitioner made a third visit to Charlotte "with crack cocaine in kilograms". He was allegedly once again accompanied by "Bobby". Mobley stated that he (Mobley) obtained "a kilo of crack cocaine". According to Mobley, petitioner thereafter came to Charlotte on a fourth occasion with an additional "kilo of crack cocaine".

During a particular period of time, Mobley was domiciled in an apartment with Wiles and a person named Marlo McAdams. Wiles was arrested and thereafter jailed during the course of his co-habitation with Mobley and McAdams. Mobley testified that Wiles prior to his arrest had a "lot of guns in the house". Mobley stated further that he continued "to deal with [petitioner] after [Wiles] was arrested". Mobley estimated that in total he obtained "between 40 and 60 kilograms of cocaine" from petitioner.

At the behest of the United States, Mobley described a chart of "the drug organization through February of '93 to September of '94". That chart injected into the trial many persons and transactions wholly unrelated to petitioner. Mobley stated:

> [I started with] Uncle Paul when I came down in February and I started riding with [him] . . . during February-April [there] was a guy from Trinidad, which I didn't know his name, that was supplying Wesley and Robby which supplied my Uncle Paul . . . Brooklyn, New York that's another source my Uncle Paul used to get cocaine from. . . . Doug Serrat was a cooker...These guys would bring powder cocaine to Charlotte [and] Doug Serrat would transfer it into crack cocaine . . . Larry Davis and Kent, they was two guys that supplied my Uncle Paul also . . . Monroe Road was a strip of road which my Uncle Paul had an apartment where he stashed his drugs and money . . . Little Rock is a project off the west side of town which my Uncle Paul supplied . . . a half a kilo a week went into that neighborhood . . . the names below Griertown [are] people that worked for my Uncle Paul. . . . Jeep was a customer of my Uncle Paul . . . November '93 . . . this is the time period when [petitioner] and Bobby came into the organization in which me and Uncle Paul met [Wiles] . . . Right around August, [petitioner] went to Jamaica. At this time, Bobby used his source to bring cocaine down to North Carolina . . . at this time, [Peter] was supplying me with cocaine and I'm pulling away from Uncle Paul . . . [*We all had*] *separate parallel operations at the time*. . . . [I had] an operation going in Cornelius, North Carolina during June of '93 to November of '93 . . . the people working for me in Cornelius [were] Billy Davis, Dean and this guy Big Bird . . . [In the] Little Rock and Boulevard Homes Apartments . . . Eric Sampson and Eddie Little [were] working for [me] . . . Mark Verilano, Peewee and his brother [worked for me in Cedar Green].[2]

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2. Mobley's testimony that "[We all had] separate parallel operations at the time" underpins our claim that multiple conspiracies as opposed to a single

(Cont'd)

Mobley also described a individual named Leon "that bought eight-balls and quarter-ounces from us" ; Bobby "[who] was another guy from the organization"; Hawk "[who] was another drug dealer [who] had his own organization in Griertown; Brian Alexander; Big Rodney from Larry Davis' organization"; Brady from Rodney's organization; Dog — "another fellow in Griertown"; Flew Jay — "another person from Uncle Paul's organization", and William Matthews and Jo Richardson, both of whom were suppliers to Mobley.

Subsequent to his arrest, Mobley placed a monitored and recorded telephone call to petitioner. Mobley described the purpose of the call as "to set up a drug transaction. . . . to convince the agent I had ties to New York City". Mobley made references to Wiles in the conversation. Petitioner addressed Mobley as "D Dog" and inquired about Uncle Paul and the arrest of Richard Crawford. Petitioner further stated to Mobley "Hey, come get it, man". Mobley understood this remark to mean "can I come up to New York and get the drugs myself".[3]

b. Balford Wiles

As previously noted, Wiles is the "Peter" referred to by Mobley. At the time of trial, Wiles was serving a 15 year sentence. He pleaded guilty to participation in a drug conspiracy. Prior to negotiating a specific disposition, Wiles' guidelines required a sentence of between 360 months

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conspiracy were proved at trial. That testimony must be read in light of the fact that no evidentiary references were made in the trial to any of the co-defendants named in the indictment. Moreover, Mobley identified persons and activities wholly unconnected to appellant.

3. On cross-examination, it was revealed that Mobley received a less than honorable discharge from the military service because of his involvement in credit card fraud. Mobley was also involved in a drive-by shooting. Mobley stated that he "kept hearing threats they was going to do something to me, so I got tired of hearing them and went over there and shot up a parking lot and left". Mobley also paid Mark Verilano and Ronnie Brown and "a guy named Rayford . . . to whip Williams Matthew's with a shotgun" and retrieve $44,000. Mobley testified that he was armed with a weapon at all times. In contrast to his claims that a large operation existed and many kilos of cocaine were distributed, Mobley testified that he earned only $40,000 "over a two-year period".

to life. Wiles is a citizen of Jamaica and an illegal alien in this country. He entered the United States on a visitor's passport and did not return to Jamaica. Wiles' legal woes commenced in New York where he was arrested for weapons offenses. He fled from New York via bus to North Carolina to avoid prosecution. Wiles testified that he thereafter commenced trafficking in cocaine with petitioner.

Wiles' first customer was [Uncle] Paul Mobley. Wiles testified that he informed Mobley "of a person in New York which I could turn him on to". Thereafter, Wiles allegedly entered into an arrangement with petitioner. Wiles testified that petitioner traveled to Charlotte via airplane and brought a "little over half of key". Wiles stated that petitioner returned in "about a week . . . [with] more than [the] first trip, because he was building up". According to Wiles, third and fourth trips to Charlotte were undertaken by petitioner. Wiles could not remember the amounts of cocaine involved.

Wiles stated that petitioner was accompanied on the fourth trip by Bobby Sang. In this context, Wiles stated that "[petitioner] brought Bobby down to start transporting it down [and] later on, most of the trips was done by Bobby". Wiles testified that "a guy named Mike" assisted "Bobby in making trips". Wiles described Mike as "heavy-set, dark skin, wears glasses". Wiles also recruited Richard Crawford to transport cocaine from New York to Charlotte.

On cross-examination, Wiles elaborated on the firearms possession incident which prompted his re-location to North Carolina and assumption of at least two aliases. Wiles was a passenger in a van. He and others in the van were armed. The van was stopped by police officers and an attempted flight ensued. A police officer "jumped on the running board" of the van and shot one of the passengers. That passenger, an individual identified as Donovan, died. Wiles was also wounded in the incident. Wiles further admitted that he possessed at least three firearms in his residence at the time of his arrest. The guns found in Wiles' residence included "a street sweeper (shotgun)"; a Mach 11 semi-machine gun, and a mini 14 rifle.[4]

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4. It was further revealed on cross-examination that Wiles advised authorities after his arrest that "after two trips Bobby started supplying Darwin

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c. Richard Crawford

Crawford at the time of trial was serving a sentence of 180 months. Crawford confirmed that he was recruited by Wiles to transport cocaine from New York to Charlotte. Prior to the proposition, Crawford was "a street dealer in New York". During his first trip to transport cocaine, Crawford was accompanied "Bobby Sang and his cousin, Mike". Crawford testified that "approximately a kilogram" of cocaine was transported from New York to Charlotte on that occasion. He further stated that it was supplied by petitioner. The cocaine was delivered to Wiles and Darwin Mobley.

Crawford testified that he thereafter continued to make deliveries on a weekly basis. The deliveries began in 1993 and occurred between "September [and] November". There was a cessation after November "when Wiles was taken into custody". The deliveries resumed in February or March of 1994. Crawford supported himself between November and February by "borrowing money". Prior to Wiles' arrest, Crawford shared an apartment with him.[5]

d. Marlo McAdams

McAdams at the time of trial was imprisoned serving 24 years (292 months). McAdams met Wiles in 1993 in Charlotte. According to McAdams, Wiles advised him that "he (Wiles) was selling drugs". McAdams further stated that Wiles identified "a friend named Rocky from New York" as his source. Thereafter, Wiles was incarcerated and

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the crack and [appellant] was cut out". A motive for Wiles' bias against appellant was also elicited. In 1993, prior to his arrest, Wiles learned that appellant "had an affair with [his] wife".

5. On cross-examination Crawford testified that he operated the motor vehicle in a drive-by shooting orchestrated by Darwin Mobley. Mobley advised Crawford that he intended to "shoot whoever he saw, if he saw the guys, attempt to scare them". Crawford further stated that Wiles had at least two sources of supply in New York, including Bobby Sang. Crawford also transported cocaine from Florida to North Carolina for William Matthews. Crawford was also aware that Darwin Mobley planned and executed a robbery of William Matthews.

McAdams became closely associated with Richard Crawford. McAdams testified that Crawford "took [him] around New York and [he] met [petitioner]". McAdams subsequently "started making trips and selling drugs". In this context, McAdams commenced "buying dope . . . for [himself]". McAdams in some instances joint-ventured with Darwin Mobley. McAdams stated that he could "buy drugs all over New York".

e. Bobby Shawn Sang

Sang at the time of trial was serving a sentence of 11 years and 3 months. Sang testified that he met petitioner in September of 1992. Sang was involved in "distributing drugs in South Carolina". He provided petitioner with transportation to North Carolina. Sang claimed that they were in possession of "a key and a half [of] crack cocaine" on that occasion. The cocaine was delivered to Wiles. Sang after other transactions independent of petitioner argued with Wiles because "[his] money messed up". Specifically, Wiles claimed that Sang was "shorting his stuff". Wiles' subsequent arrest ended the conflict.

f. [Uncle] Paul Mobley

Mobley began distributing drugs in September of 1992. Wesley Hunter was Mobley's primary supplier. Wiles introduced Mobley to petitioner. Mobley testified that he purchased 17 ounces from petitioner for $11,000. According to Mobley, future purchases ensued. Mobley testified "I dealt with [petitioner] a couple more times". Mobley during his tenure in the drug business "asked a [person] to beat this guy up". However, the person firebombed a house instead. The person whom Mobley wanted assaulted was Wesley Hunter. Mobley testified that [Hunter] had called over to his house and left a message on [his] answering service that he was going to

ii. Joseph Alexander Boykin

Boykin is employed by the Bureau of Alcohol, Tobacco and Firearms. He was utilized by the United States as the case agent in this matter. Boykin testified that the "investigation initiated when [Wiles] was arrested for being a fugitive from the state of New York". When Wiles was arrested, "a small amount of cash and weapons were recovered from his

apartment". The contraband resulted in the investigation and arrest of Crawford, who resided with Wiles. Crawford "was [thereafter] interviewed by investigators and provided information that he was a courier for a drug organization in Charlotte".

The disclosures of Crawford prompted an interrogation of Wiles. Boykin testified that Wiles "identified a subject known as Rocky from New York as being the principal supplier of crack cocaine to the organization". Wiles information underpinned a subsequent "traffic stop . . . conducted on Darwin Mobley". Mobley surrendered an address book during the course of an interrogation. That interrogation was a prelude to an interview of [Uncle Paul] Mobley and others. Paul Mobley thereafter provided to Boykin "a lot of information about the conspiracy involving his nephew, Darwin Mobley". Paul Mobley allegedly identified petitioner "as being the principal supplier of cocaine from New York".

The principal purpose of Boykins' testimony was to admit a chart illustrating a flow of telephonic contact between petitioner and Paul Mobley; petitioner and Wiles; petitioner and Richard Crawford; petitioner and Darwin Mobley, and petitioner and Marlo McAdams. The chart was based on telephone records. However, on cross-examination it was established that the telephone records were not **per se** incriminatory. For example, Wiles during a particular period made 293 calls to New York. Only two of those calls were placed to petitioner's residence.[6]

III. The Defense

i. Background And Character Witnesses

a. Jemargie Morrison

Morrison is petitioner's mother. In April of 1994 and August of 1994, Morrison and petitioner traveled to Jamaica "to bring [her] father back [to the United States]". Morrison's father had "arthritis in his spine, an infection of the blood [and] parasitic blood". When Morrison's father was returned to the United States, petitioner assumed the responsibility of conveying him to medical facilities for treatment.

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6. Boykin also conceded that he did not have "any tangible physical evidence to put any drugs in [appellant's] hand".

Morrison testified that her son has at no time to her knowledge possessed "large sums of money". She was aware that he received a substantial severance settlement when his employment with Scandinavian Airlines was terminated Morrison further testified that petitioner owned a restaurant for a period of time. The restaurant specialized in "oxtails, rice [and] Jamaican food." Food was offered on an takeout basis only. The restaurant was named "Island Taste". Morrison testified that petitioner purchased a residence which was not in sufficient condition for habitation. He personally performed the work necessary to render the premises habitable. In July of 1995, petitioner married Toni Allen. Between August of 1994 and the time of trial, petitioner was employed in a janitorial business.

b. Julia Allen

Allen is petitioner's mother-in-law. Allen has known petitioner since 1988. She testified that petitioner purchased a burned-out residence adjacent to her own which "needed fixing". Petitioner renovated it himself. During 1993, prior to completion of the renovations, petitioner resided in a basement apartment in a building owned by Allen. Allen at no time observed "any evidence of drug dealing around that apartment".

c. Hubert Gordon

Gordon at the time of trial was a student in St. Vladimir's Orthodox Theological Seminary. He met petitioner in 1988. Gordon is the godfather of the daughter born into the union of petitioner and Toni Allen. Gordon attended undergraduate school at Stony Brook University. During that period, Gordon frequented petitioner's restaurant. Gordon attempted to negotiate a contract between the university and petitioner relative to provision of food to the student cafeteria prepared by petitioner's restaurant.

d. Toni Allen-Osbourne

Allen-Osbourne was married to petitioner in July 1995. She testified as to an awareness that friction existed between petitioner and Wiles. The friction stemmed from Wiles' belief that petitioner had sexual relations with Wiles' wife, Tammy. Petitioner previously worked for a

supermarket; Scandinavian Airlines in the baggage claim department; at the restaurant; at a limousine company as a chauffeur, and as a custodian. Allen-Osbourne had no basis for a belief that petitioner was at any time involved in drug trafficking.

e. George Branker

Branker is a friend of petitioner and Allen-Osbourne's family. Branker retired from employment with the New York City Fire Department in 1977. In 1982, Branker was appointed to the school board in District 29 and "still serves at this time". Branker frequently observed petitioner in the process of completing repairs on his residence. Branker testified that he is like a second father to Toni Allen-Osbourne. She frequently contacted him to assist in matters associated with petitioner's restaurant. He described his aid as "I would assist them in opening and sometimes be around to close". Petitioner expended a considerable amount of time at the restaurant. Branker concluded his testimony with the statement that "[he] would not mind having [petitioner] as a son".

f. Joseph Allen

Allen is petitioner's brother-in-law. Allen is a student at Hofstra University. He described petitioner as "a very personal [and] dear friend". Allen has been in petitioner's presence at least weekly since 1988. He testified that petitioner worked very hard in the restaurant. Allen stated that [petitioner] was there all of the time. He cooked. He cleaned. He took care of his business. "Allen testified that petitioner did not "hang around with people [who] were involved with drugs".

g. Mark Anthony Purboo

Purboo is petitioner's cousin. Petitioner's mother is Purboo's mother's sister. Purboo is employed as a dental assistant. Purboo testified:

> [Petitioner] is hard-working . . . He is never lazy, always doing something, and he is always helping someone . . . He devotes a lot of time to whatever he plans . . . opening a restaurant, he is there all day. He is going to school, he

is there. Everything he is doing, he is busy trying to make ends meets for the family. That is why he started the restaurant, to see if it would be better for the family, he could make money.

h. Carlos Walton

Walton is employed as a teacher in New York City. He was the best man at the wedding of petitioner and Allen-Osbourne. Walton has never "seen anything around [petitioner] that indicated he was involved in drugs". He described petitioner as a "very good-hearted person, a very reliable person".

i. Richard Patrick Billy

Billy is the manager of Triangle Services. Triangle Services is a janitorial company. He met petitioner in August of 1985. They worked together at Triangle Services until 1987 when petitioner commenced employment at Scandinavian Airlines. Petitioner returned to his employment at Triangle Services in April of 1995 and remained until November of 1995. Billy thereafter offered petitioner a job. Petitioner requested that an uncle of his be provided the job because the uncle's need for employment was greater. Billy stated that "[petitioner] is a type of person, he would put you in front of himself. If something is going down, he [would] look out for you first as opposed to himself".

ii. The Testimony Of Petitioner

The instant matter represents the first arrest and accusation of unlawful behavior experienced by petitioner. Petitioner began working at Triangle Maintenance at age 16. He at that time was in the eleventh grade in high school. The job was located at Kennedy Airport in New York. Petitioner stated "I cleaned up, put newspapers out in the first-class and third-class lounges [and] made sure that snacks [were] there for the incoming passengers". After graduation from high school, petitioner enrolled at Community College. He also secured employment at Scandinavian Airlines as a baggage handler and worked at United Parcel Service at night. Petitioner thereafter enrolled in the College of Aeronautics. He completed that two-year program and obtained a

certificate. The certificate confirmed petitioner's training as an "aircraft maintenance technician".

Petitioner's employment at Scandinavian Airlines thereafter ceased. That airlines moved to Newark, New Jersey from New York City. Petitioner received " a buyout of two and a half years' salary in advance". Subsequent to his election to take the buyout, petitioner was unemployed for a period of time. Petitioner utilized the buyout proceeds to purchase a fire-damaged house from an estate in September of 1992. He thereafter repaired the damages. Petitioner's effort to renovate the premises began in September of 1992. The house became suitable for habitation in July of 1993. Prior to July of 1993, petitioner resided in the basement apartment within a residence in Queens, New York owned by the Allen family. In April of 1993, petitioner opened a restaurant in partnership with others. He worked at the restaurant from 6:30 a.m. until 3:00 p.m. At 3:00 p.m. petitioner's "partner would relieve [him]". The restaurant was not profitable. Operation of the enterprise ceased in February of 1994.

Petitioner admitted to a relationship with Wiles. He met Wiles in 1991 in New York City. Wiles introduced petitioner to Crawford. Petitioner denied any involvement in drug trafficking. Petitioner specifically denied that crack cocaine was at any time possessed in his apartment and/or that Crawford transported cocaine at his behest. The visits which petitioner made to North Carolina were social in nature. Wiles introduced petitioner to Darwin Mobley, Paul Mobley and Gene Mobley. There were no discussions concerning drug trafficking. Petitioner has "seen Bobby [Sang], but . . . never met [him]". Wiles brought Sang to petitioner's restaurant. Wiles also brought McAdams to the restaurant.

Wiles' wife also frequented petitioner's restaurant. Petitioner confessed to an indiscretion stating that Wiles' wife "came to the restaurant every day to just sit and talk, and eventually one day I ended up sleeping with her". Subsequent to Wiles' arrest, Crawford visited the restaurant. Crawford stated to him that "Wiles was arrested on gun charges in North Carolina [and] Wiles said to blame everything on [petitioner]". At the time of his own arrest, petitioner was enrolled in computer graphics and video production classes at New York University.

On the basis of the foregoing evidence, petitioner has convicted of conspiracy. The Fourth Circuit affirmed.

This Petition for Certiorari follows:

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ENFORCE THE PRESCRIPTIONS AGAINST AND REMEDY FOR CHARGING MULTIPLE CONSPIRACIES WITHIN A SINGLE CONSPIRACY COUNT.

The indictment charged in Count One alleged a single conspiracy wherein petitioner was alleged to have conspired with Tony Bernard Alexander; Albert Leonard Alexander; Bryant Lamar Alexander; Johnny Stacey; Herbert Vanhoy Williams; Kenneth James Wallace; Nathan Leon Johnson; Lonnie Hames, Jr.; Lonnie Dewayne Robinson; Nolan Lamont Stafford; Gifford Wallace, and others identified and unidentified. None of the individuals specifically referred to as indicted co-defendants in Count One were mentioned in proofs adduced within petitioner's trial. It would appear that those individuals had undefined relationships with the alleged co-conspirators/informants who testified against petitioner at trial. The lack of any references to the identified co-defendants at trial underscores the clear fact that several conspiracies as opposed to a single conspiracy was both alleged in the indictment and proved at trial.

In this context, we emphasize at the outset that Darwin Jerome Mobley testified pursuant to questions asked on direct examination by the United States that "[we all had] separate parallel operations at the time".[7] That testimony essentially established that multiple conspiracies were alleged in Count One. Notwithstanding the fact that the proofs established the existence of several distinct conspiracies jointly charged within Count one, the district court did not either dismiss the charge or instruct the jury as to the significance of a factual finding of multiple conspiracies. A finding that two or more distinct offenses are charged

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7. Darwin Mobley, Jesse Eugene Mobley, [Uncle] Paul Mobley, Balford Wiles, Richard Crawford, Crystal Perry, Andre Willis, Michael Anthony Wallace and Jeffrey Jordon were listed in the indictment as indicted co-conspirators. At trial, Darwin Mobley, Paul Mobley, Balford Wiles and Richard Crawford were alleged as having had any contact with appellant.

within a single count must as a matter of law result in dismissal of that count on the ground that it is duplicitous. *At a minimum, the jury must be instructed to acquit if it finds more than one conspiracy within the single count.*

We submit that the trial court committed plain error when it submitted the clearly duplicitous count to the jury. The trial court was required **sua sponte** to dismiss Count One when it became obvious that the United States' proofs were at variance with the single conspiracy outlined in the indictment. The absence of a juridical dismissal or edification of the jury as to its duty to acquit permitted not only the charging of multiple conspiracies in a single count but also an infirm conviction. It bears repeating that the United States' primary alleged co-conspirator/informant specifically testified that distinct, separate and antagonistic enterprises existed. Simply put, the United States alleged a single conspiracy in its indictment and did not prove such a conspiracy. Indeed its own proofs manifestly established multiple conspiracies. The United States' proofs required that it suffer either a dismissal or acquittal of petitioner. Due process demands no less.

A. The Constitutional Right To Indictment

The purpose of an indictment is to provide the defendant with notice of charges against him in order that he may prepare a defense, to effectuate the Fifth Amendment's double jeopardy provision and to shield an accused from an unwarranted and unfounded charge of involvement in serious crimes by interposing the independent judgment of the grand jury. *United States v. Radowitz*, 507 F.2d 109 (3rd Cir. 1974). Stated somewhat differently, no man may be brought to trial for crime unless a grand jury shall first find sufficient cause for a charge. And, the indictment must allege all essential elements of the offense. *United States v. Locklear*, 97 F.3d 196, 199 (7th Cir. 1996); *United States v. Bates*, 96 F.3d 964 970 (7th Cir. 1996). *Cf. United States v. Werme*, 939 F.2d 108 (3rd Cir. 1994) (Generally each count of the indictment must set forth a sufficient description of the crime charged); *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994) (Indictment must include every essential element of the offense or it is invalid and mere reference to applicable statute does not cure the defect).

It should be emphasized that an indictment is not amendable by a court to charge an offense not found by the grand jury, either by substitution of offenses or to supply substantive omissions. *United States v. Soskin, supra* at 1380. The settled rule is that an indictment may not be amended except by resubmission to the grand jury. *Russell v. United States*, 369 U.S. 749, 770 (1962). In short, the possible bases for conviction are limited to those contained in the indictment. New ones may not be added without resubmitting the indictment to the grand jury, whether they are added literally, by formal amendment to the indictment, or constructively, Moreover, new bases for conviction may not be supplied by proof at the time of trial of a crime not clearly and fully charged or by instructions to the trial jury. In short, no modification may be made which would allow conviction on grounds not charged by the grand jury. *United States v. Leichtman*, 948 F.2d 370, 374-377 (7th Cir. 1991).

B. General Principles Pertaining To Conspiratorial Liability

Knowledgeable entry into an agreement with others to commit an offense or offenses is the gist of the crime of conspiracy. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). *See United States v. Carpenter*, 95 F.3d 773, 775 (9th Cir. 1996); *United States v. Fleschner*, 98 F.3d 155, 159 (4th Cir. 1996); *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983); Simply put, the parties must have a meeting of the minds in the common design, purpose or objects of the conspiracy. *See United States v. Zang*, 703 F.2d 1186, 1191 (9th Cir. 1982).

Explicit in the requirement of an agreement under Federal Law is that each accused must be shown to have *purposely and, knowingly participated* in the conspiracy. *See United States v. Lee*, 694 F.2d 649, 652 (11th Cir. 1983); *United States v. Littlefield*, 594 F.2d 682, 684 (8th Cir. 1977), *cert. den.*, 98 S. Ct. 522 (1978); *Cf. United States v. Blasco*, 702 F.2d 1315, 1130 (11th Cir. 1983). We stress that neither mere association with individuals engaged in illegal conduct nor mere knowledge of the existence or acquiescence in the object of a conspiracy is sufficient to sustain a conspiracy conviction. *See United States v. Richmond*, 700 F.2d 1183, 1190 (8th Cir. 1983). *See United States v. Kraig*, 99 F.3d 1361, 1368 (6th Cir. 1996); *United States v. Stoner*, 98 F.3d 527, 530 (10th Cir. 1996); *United States v. Gray*, 96 F.3d 769, 772 (5th Cir. 1996).

The government is not required to prove that the person charged participated in each aspect of the operation. *See United States v. Russell, supra* at 1249-1250; *Cf. United States v. Coke*, 704 F.2d 554, 557 (11th Cir. 1983). Moreover, The government need not show that the agreement to engage in criminal activity was formal or excess. *United States v. Zang, supra* at 1191. An implicit or tacit agreement may be inferred from the facts and circumstances. *United States v. McCarthy*, 97 F.3d 1562, 1568 (8th Cir. 1996). *See United States v. McCarty*, 611 F.2d 220, 222 (8th Cir. 1979). *United States v. Monroe*, 552 F.2d 860, 862 (9th Cir. 1977), *cert den.*, 431 U.S. 971 (1978).

However, it bears repeating that a conspiracy as a crime comprehends more than mere joint enterprise and must be shown to include the essential elements outlined above such as a meeting of the minds and criminal intent to commit the substantive offenses. *See United States. v. Pretty*, 98 F.3d 1213, 1218 (10th Cir. 1996); *United States v. Blount*, 98 F.3d 1489, 1493 (5th Cir. 1996); *United States v. Trowery*, 542 F.2d 623, 626 (3rd Cir. 1976), *cert. den.*, 429 U.S. 1104; *United States v. Thompson*, 553 F.2d 1006, 1009 (6th Cir. 1977), *cert. den.*, 429 U.S. 939 (1977).

The direct aim of the law in the criminalization of conspiracies is to prosecute the agreement itself, separating and stigmatizing jointly planned criminal activity prior to its completion. *See United States v. Alvarez*, 610 F.2d 1250, 1254 (5th Cir. 1980). Stated somewhat differently, the statutes proscribing conspiracy are aimed at the evil of collective criminal agreement and Seek to attack problems quite apart from the underlying offense. The conspiracy law is intended to combat the danger of secret combinations to break the law. *United States v. Badolato*, 701 F.2d 915, 921 (9th Cir. 1983): *United States v. Jeffers*, 532 F.2d 1101, 1110 (7th Cir. 1976), *aff'd in part, vac. in part*, 429 U.S. 815 (1977); *United States v. Heldon*, 479 F. Supp. 316, 321 (E.D. Pa. 1979).

C. The Distinction Between Single And Multiple Conspiracies

If the totality of the evidence shows a concert of action in which all the parties worked together with a single design for the accomplishment of a common purpose, then there is but one conspiracy. Simply put, the evidence must demonstrate an overall collusive arrangement. *See United States v. Jackson*, 696 F.2d 578, 582-584 (8th Cir. 1982); *United States*

v. Johnson, 585 F.2d 119, 128 (5th Cir. 1978). The gist of the criminal conspiracy, the agreement between co-conspirators, may continue over an extended period of time and involve numerous transactions. Parties may join a single conspiracy after its inception and may withdraw and terminate their relationship prior to its completion. *See United States v. LaRusso*, 695 F.2d 45, 54-55 (2nd Cir. 1982). Stated somewhat differently, for the purpose in determining whether a single conspiracy exits, a plan does not become several plans simply because some members are cast in more vital roles than others or because certain members perform only a single function. Moreover, it does not become several plans because of internal personnel changes. *See United States v. Miche*, 558 F.2d 994-995 (5th Cir. 1979). *Cf. United States v. Borchardt*, 698 F.2d 697, 702 (5th Cir. 1983).

Each conspirator must have a general knowledge of the overall purpose and scope of the conspiracy, but it is not necessary that the conspirators know each other or the details of each enterprise making up the conspiracy. *See United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). However, it should be emphasized that the fact that there is some interrelationship between conspiracies does not necessarily make them the same criminal enterprise. *See United States v. Ingman*, 541 F.2d 1329, 1331 (2nd Cir. 1972). A critical litmus test in determining where one conspiracy ends and another begins is to inquire whether any of the major common participants considered his or their mutual dealing to have terminated. *United States v. McCarthy, supra*; *United States v. Sotelo*, 97 F.3d 782, 789 (5th Cir. 1996).

With respect to the instant single conspiracy alleged in Count One, the United States was required to adduce evidence that any alleged agreement encompassed all of the parties. If petitioner was not found to be a party to the single conspiracy outlined in Count One, he was entitled to an acquittal. In this context, we stress that the United States' proofs established several separate and distinct conspiracies. *See United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977), *reh. den.*, 551 F.2d 687 (5th Cir. 1977). The proofs elicited from the States' primary witness clearly did not establish the agreement of purpose which a single conspiracy must incorporate. Indeed, that individual informed the jury that separate agreements were at issue. *Kotteakos v. United States*, 328 U.S. 750, 755 (1946); *United States v. Coward*, 630 F.2d 229, 231 (4th Cir. 1980). *See*

United States v. Levine, supra at 663. *Cf. United States v. Ochoa*, 609 F.2d 198, 201 (5th Cir. 1980) (In order to have a single conspiracy, the conspirators must be directed toward a common goal); *United States v. Ashley*, 555 F.2d 462, 465 (5th Cir. 1977), *reh. den.*, 559 F.2d 29 (5th Cir. 1977), *cert. den.*, 434 U.S. 869 (1978) (Common purposes and plan must be proved by a development and a collocations of circumstances).

D. The Trial Court Was Required To Dismiss Count One

The indictment in Count One notified petitioner that the United States alleged and was required to prove a single conspiracy at trial. Thereafter, it was manifest at trial that the United States' proofs established several distinct agreements as opposed to the single conspiracy in Count One. Notwithstanding the clear fact that the proofs were at variance with the allegations set forth in the indictment, the trial court did not consider either dismissal of Count One or instructing the jury as to the significance of the variance. In so doing, the trial court permitted the United States to present at least two separate conspiracies to the jury within the single count without legal guidance. That determination violated the rules as to permissible jointer of offenses and permitted the jury to convict petitioner of an offense not charged in the indictment. In this context, the court in its instructions was required to instruct the jury that it must acquit if it found two distinct conspiracies in Count One. No such instruction was uttered despite the unequivocal testimony of Darwin Mobley that distinct and antagonistic groups were identified in Count One as opposed to a single group of conspirators with a common purpose.[8]

a. The Law As To Duplicity

Fed. R. Crim. Proc. 8(a) states as pertinent hereto:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

8. Evidence as to the distinct and antagonistic nature of the group was also elicited from Wiles, Paul Mobley and Bobby Sang.

Where two or more separate and distinct conspiracies are joined in the same count of an indictment, such as in Count One of the instant indictment, that count is duplicitous in contravention of Fed. R. Crim. Proc. 8(a). *See United States v. Kearney*, 451 F. Supp. 33, 35 (S.D.N.Y. 1978). The inherent problems with respect to a duplicitous count are: (1) a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both; (2) the defendant may be prejudiced in the context of evidentiary rulings during trial, since evidence admissible on one offense might be inadmissible on the other; and (3) there is no means to determine with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to either. *United States v. Starks*, 515 F.2d 112, 116 (3rd Cir. 1975). The doctrine of duplicity is result-oriented. It prohibits the charging of multiple offenses in a single count but allows the charging of multiple means constituting a single and continuing offense. This is true even if the components of the single offense may otherwise be treated as offenses. *United States v. Kearney, supra. See United States v. Cohen*, 444 F. Supp. 1314, 1320 (E.D. Pa. 1978); *Cf. United States v. Berardi*, 675 F.2d 894, 897-898 (7th Cir. 1981).

b. Count One Is Fatally Duplicitous

The United States Supreme Court has repeatedly warned against "attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). The instant conspiracy count is a form of wheel conspiracy because it purports to charge a single conspiracy due to the presence of one common participant, viz. Darwin Mobley.[9] With respect to the type of conspiracy attempted to be charged here, it has become an axiom of conspiracy law that for a wheel to exist, those people who form the wheel "spokes" must have been aware of each other and must do something *in furtherance of some single illegal enterprise. See Blumenthal v. United States*, 332 U.S. 539, 556-557 (1947). Otherwise, "the conspiracy lacks the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). Here, the evidence presented at trial not only failed to establish a single over-riding agreement

9. The analysis is complicated herein because the proofs seem to establish the existence of several persons with separate and even antagonistic enterprises. A wheel may also be found around Wiles, Paul Mobley and Bobby Sang.

among the conspirators, but also fails to allege any concert of action that would provide such a rim. The evidence adduced herein did not establish that petitioner had any knowledge whatsoever of the conspiracy between Mobley and the others persons named in the indictment as co-defendants. As with *Kotteakos*, such a wheel simply will not roll.

The factual parallels between this case and *Kotteakos* are instructive. In *Kotteakos*, numerous individuals were indicted and charged with a single general conspiracy to violate the National Housing Act by inducing lending institutions to make loans on the basis of false and fraudulent information contained in loan applications. The central and common figure in each of the fraudulent loan applications was one Simon Brown. Brown, having had experience in obtaining loans under the National Housing Act, undertook to act as a broker for the others in renovation, knowing that the proceeds of the loans would not be used for the purposes stated in the applications

Nineteen defendants went to trial. Thirteen defendants' cases went to the jury and seven were convicted. With respect to the petitioners in *Kotteakos*, there was no evidence to connect them to the other defendants, except that they had dealt through Brown in obtaining their loans. With respect to the others defendants, there was not only no connection between them and the petitioners, but there was no relationship proven between and among themselves. The singular common fact was that they had all dealt through Brown, the hub. At least eight separate conspiracies, none having any connection with the other, were found in *Kotteakos*. In reviewing the convictions, the *Kotteakos* Court stated:

> Here, toleration went too far. We do not think that either Congress, when it enacted § **259**, or this Court, when deciding the **Berger** case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, co-conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all . . . But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score or more conspiracies and at the same time to score of men involved, if at all, only separate in them. The danger of

> transference of guilt from one another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. **[343 U.S. supra at 773-774]**

Some two years after *Kotteakos* was decided, the United States Supreme Court, in deciding *Blumenthal v. United States, supra,* took occasion to comment on the significance of *Kotteakos.* The *Blumenthal* Court stated:

> [This] case therefore is very difference from the facts admitted to exist in the **Kotteakos** case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a large all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary, each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies were therefore distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. These was no drawing of all together in a single, overall, comprehensive plan." **[332 U.S. supra at 558].**

So too, the United States' proofs as to Count One failed to draw petitioner and any of the named co-defendants together in a single, overall, comprehensive plan. Moreover, the testimony of the alleged co-conspirator/informants established separate, distinct and antagonistic enterprises. Darwin Mobley literally stated this fact. There can be no other conclusion but that Count One as proved at trial does little more than charge at least two separate agreements, each having its own distinct illegal end, with only Mobley and perhaps Wiles common to each.

The issue raised herein was analyzed in *United States v. Cryan*, 490 F. Supp. 1234 (D. N.J. 1980). In *Cryan*, the grand jury erroneously incorporated multiple conspiracies into a single count. The Court in *Cryan* found that a conspiracy count which charges two conspiracies as one has no vitality. The indictment in *Cryan* was properly dismissed. The *Cryan* court stated:

> An indictment may not charge multiple conspiracies in a single count . . . the rational for this principle is two-fold. First, a jury verdict on any count which charges two separate offense is ambiguous: it does not reveal whether the jury considered and reached a verdict on each offense charged . . . second a count charging two offenses not does reveal whether the grand jury intended to charge either not had it been aware that the offense were distinct. This problem is particularly acute when the multiple offenses charged are conspiracies, because the grand jury may have indicted one defendant on the basis of evidence admissible only against other defendants. **[429 F. Supp. supra at 1239]**

This Court has no just option other than to dismiss the conspiracy conviction herein. There is no basis upon which it may be determined that "the grand jury intended to charge [multiple conspiracies] or whether it would have charged either had it been [correctly instructed] that the [conspiracies] were distinct." *United States v. Cryan, supra.* More importantly, petitioner was absolutely entitled to a dismissal because of the United States' failure to prove the single conspiracy which it alleged in the indictment. The instant matter is a rarity because the United States' primary witness testified to the existence of multiple enterprises and no action to instruct the jury properly was taken. The conviction below is a hollow mockery of justice.

II.

A PLAYGROUND WITHIN THE GROUNDS OF A PRIVATELY OWNED AND MAINTAINED APARTMENT COMPLEX IS NOT OPEN TO THE PUBLIC WITHIN THE INTENDMENT OF 21 U.S.C.A. § 860.

The United States sought and received an enhancement of petitioner's sentence on the ground that alleged co-conspirators distributed cocaine within the proscribed distance of a playground. 21 U.S.C.A. § 860, the applicable statute, requires as an element that the playground be "open to the public". *See* 21 U.S.C.A. § 860(e)(1). The testimony at trial indicated that the playground at issue was wholly within a privately owned and maintained residential apartment facility. The representative of the corporate owner of the property in this context testified the playground was built and is maintained for "the benefit of the people who live there . . . and their guests". That representative clearly stated the playground was "put there for the use of the residents of the apartment complex".

We submit that as a matter of law § 860 was not intended to cover privately owned and maintained facilities. The district court erred in ruling that the United States was correct in its position that the enhancement applied. *But see United States v. Horsley*, 56 F.3d 50 (11th Cir. 1995). (Issue of whether playground was open to the public was a question of act for jury).

CONCLUSION

For the foregoing, reasons we respectfully request that this Court grant certiorari from the ruling of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MAY 19, 1998

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DUANE JELEAL OSBOURNE, a/k/a Rocky, a/k/a Duane Anthony Osborne,
Defendant-Appellant.

No. 96-4906

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Richard L. Voorhees, Chief District Judge.
(CR-95-178-V)

Submitted: April 7, 1998

Decided: May 19, 1998

Before LUTTIG and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Alan Dexter Bowman, P.A., Newark, New Jersey, for Appellant. Mark T. Calloway, United States Attorney, Gretchen C.F. Shappert, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Appendix A

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Duane Jeleal Osbourne was convicted by a jury of conspiring to possess with intent to distribute and to distribute cocaine and crack cocaine within 1000 feet of a playground in violation of 21 U.S.C.A. §§ 846, 860 (West Supp. 1998). He appeals his conviction and sentence, contending that (1) there was an impermissible variance between the indictment that charged a single conspiracy and the evidence at trial that Osbourne claims established multiple conspiracies; (2) the district court erred by failing to instruct the jury on multiple conspiracies; and (3) the district court erred by enhancing his base offense level by two levels under USSG § 2D1.2(a)(1)* because the playground is not "open to the public." Because Osbourne failed to raise these issues in the district court, our review is for plain error. *See United States v. Olano*, 507 U.S. 725, 732-37 (1993). We affirm.

Osbourne first claims that the district court *sua sponte* should have dismissed the charge against him because there was a variance between the indictment and the evidence at trial. "In a conspiracy prosecution, a defendant may establish the existence of a material variance by showing that the indictment alleged a single conspiracy but that the government's proof at trial established the existence of multiple, separate conspiracies." *United States v. Kennedy*, 32 F.3d 876, 883 (4th Cir. 1994). To show that multiple conspiracies existed, Osbourne relies on Darwin Mobley's testimony that at some point during the conspiracy, he stopped working for his uncle, Paul Mobley, and began his own drug distribution business. Osbourne overlooks the fact that he supplied Darwin Mobley with the drugs to distribute. Moreover, other co-conspirators testified that they transported drugs for Osbourne from New York to the Grier Heights neighborhood in Charlotte, North Carolina, and that Osbourne was

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*U.S. SENTENCING GUIDELINES MANUAL (1995).

one of their suppliers. To the extent that Osbourne attacks his co-conspirators' testimony because they pled guilty to participating in the conspiracy and received lighter sentences, we do not review the credibility of witnesses or weigh the evidence. *See United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997). Because there was overwhelming evidence of a single conspiracy, we find no plain error here.

Nor did the district court plainly err in failing to instruct the jury on multiple conspiracies. Failure to give a jury instruction on multiple conspiracies, even if the evidence supports such an instruction, is not reversible error unless a defendant can show he was involved in a separate conspiracy unrelated to the overall conspiracy charged in the indictment. *See United States v. Howard*, 115 F.3d 1151, 1157 (4th Cir. 1997); *Kennedy*, 32 F.3d at 884. Osbourne cannot make such a showing. The evidence at trial sufficiently proved that Osbourne was a main actor in the conspiracy charged in the indictment.

Finally, Osbourne contends that the district court erred in applying a two-level enhancement of his base offense level under USSG § 2D1.2(a)(1). He claims that as a matter of law, § 860 does not apply to privately owned and maintained facilities, such as the playground at the apartment complex in Grier Heights, and therefore that the playground was not "open to the public." The issue of whether the playground was "open to the public" was a question of fact for the jury. *See United States v. Horsley*, 56 F.3d 50, 51-52 (11th Cir. 1995). By rendering a special verdict that the conspiracy involved an intent to distribute cocaine and crack cocaine within 1000 feet of a playground, the jury necessarily found that the playground met the statutory requirements of § 860.

Accordingly, we affirm Osbourne's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED June 10, 1998

No. 96-4906
CR-95-178-V

US v. Osbourne

MANDATE

The judgment of this Court dated 5/19/98 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX B — CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V — CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI — JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C — STATUTE INVOLVED

21 U.S.C.A. § 860(e)(1)

§ 860. Distribution or manufacturing in or near schools and colleges

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(e) Definitions

For purposes of this section —

(1) The term "playground" means any outdoor facility (including any parking lot appurtenant thereto) intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.

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